ONG CHUAN HUAT SDN. BHD.

v.

MOHD. JAIS ABDULLAH

HIGH COURT MALAYA, PENANG
ONG SEE SENG J
[CIVIL SUIT NO. 23-128-88]
8 JUNE 1991

LEGAL PROFESSION: *Solicitor attested documents disposing of defendant's property which was subject of Mareva injunction - Whether aiding defendant to transfer property - Failure to comply with prohibitory order and variation of injunction - Whether disobedience - Wilful and intentional - Casual and accidental - Application for committal orders against solicitor - Delay by plaintiff in seeking leave - Rules of the High Court 1980, O. 52 r. 2(2).*

CIVIL PROCEDURE: *Mareva injunction against defendant's property - Solicitor attested disposal of property - Prohibitory order - Variation of injunction - Failure to comply with prohibitory order and variation of injunction - Whether solicitor aided defendant to dispose of land - Merits of case - Disobedience - Wilful and intentional - Casual or accidental - Whether prima facie case - Application for committal order against solicitor - Delay by plaintiff in seeking leave - Whether inordinate - Rules of the High Court 1980, O. 52 r. 2(2).*

On 20 June 1988 the plaintiffs sued the defendant for a sum of RM121,692.89 together with interest and on 21 June 1988, obtained a Mareva injunction against the defendant in relation to his assets to a value of RM146,000 (the prohibitory order). On 27 July 1988 the plaintiffs obtained judgment in default of defence against the defendant.

On 11 November 1988 the defendant entered into a sale and purchase agreement with TPS for the sale of property (the said property) whereby R, a solicitor, attested the defendant's signature on the contract for sale. On 17 November 1988 R attested the defendant's signature as transferor on Form 14A under the NLC.

On 15 December 1988, the plaintiffs obtained a garnishee order to show cause against R & Co. for the attachment of a sum of RM141,649.57. On the same date, TPS sought to intervene to set aside the prohibitory order.

On 9 January 1989 the defendant successfully set aside the default judgment which was obtained against them. On 11 January 1989, the Court varied the injunction to exclude the said property to enable TPS to register the transfer and ordered R & Co. to pay into Court a sum of RM146,000 out of the purchase price held by the firm (the varied order). This order was duly served on R on 31 July 1989.

The plaintiffs now seek leave of the Court under O. 52 r. 2 of the Rules of the High Court 1980 (RHC) for orders of committal against R for disobeying the prohibitory order and the varied order.

Held:

[1] The prohibitory order with the penalty endorsement was served on the defendant on 21 June 1988. On 26 July 1888 an application was filed by R & Co. as solicitors for the defendant to set aside the order dated 21 June 1988. It is therefore not unreasonable to conclude that R had sight of the order dated 21 June 1988 and knowledge of the terms contained therein.

[2] Although there was no evidence to indicate that R instigated, advised or abetted the defendant to breach the injunction dated 21 June 1988, his conduct was tantamount to aiding the defendant to facilitate the transfer of the said property to TPS. Therefore a *prima facie* case had been made out against R.

[3] The said property came within the ambit of the restraining order as there is no evidence before this Court that the value of the other properties restrained exceeded the sum of RM146,000.

[4] Leave to apply for an order of committal for alleged contempt of the order dated 21 June 1988 was refused as there was an unexplained delay of 8 months by the plaintiffs in filing this application. Further this delay had allowed an intervening event to take place, that is, the variation of the injunction to exclude the said property. It would be improper to allow leave in the face of this variation and also because the application was made only after the transaction relating to the subject property had been validated by the Court.

[5] As the varied order dated 11 January 1989 was served on R on 31 July 1989 and as the sum ordered to be paid had not been paid into Court, the non-compliance by R was not casual or accidental but was intentional and deliberate. Therefore a *prima facie* case had been made out - there is no necessity at this stage to conduct an enquiry whether the order dated 11 January 1989 was invalid.

[6] As the varied order was served on R on 31 July 1989 and the plaintiff's application for leave to apply for order of committal was filed on 8 August 1989, there was no delay occasioned to justify denial of the plaintiff's application.

[Order accordingly.]

Cases referred to:

Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 1 CLJ (Rep) 33 ***(cit)***

Dodington v. Hudson [1924] 1 Bing 410 ***(cit)***

Lim Kit Siang v. Dato' Seri Dr. Mahathir Mohamad [1987] CLJ (Rep) 168 ***(cit)***

Malaysian Bar v. Tan Sri Dato' Abdul Hamid Omar [1989] 2 MLJ 281 ***(foll)***

Narain Singh v. S. Hardayal Singh Harika [1958] AIR Punjab 180 ***(foll)***

Oceania Castelana Armadora v. Miveralimexport [1983] 2 All ER 65 ***(cit)***

R v. Joyce, Ex parte Corporation Port Pirie [1930] SA SR ***(foll)***

State Bank of India, New Delhi v. D.S. Dalal & Ors. [1982] Criminal Law Journal 395 ***(cit)***

Legislations referred to:

Rules of the High Court 1980, O. 52 r. 2(2)

JUDGMENT

Ong See Seng J:

This is an application filed on 8 August 1989 on behalf of the plaintiffs Ong Chuan Huat Sdn. Bhd. for leave to apply for orders of committal against R. Rajasingam for disobeying orders of Court in this suit dated 21 June 1988 and 11 January 1989 respectively.

In support of the application (encl. 77) the plaintiffs have filed in support a statement (encl. 76) pursuant to O. 52 r. 2(2) of the Rules of the High Court 1980 and an affidavit (encl. 75) affirmed by Ong Chuan Huat, the managing director of the plaintiffs.

R. Rajasingam by way of affidavit affirmed on 30 October 1989 opposed the plaintiffs' said application.

Counsel for R. Rajasingam applied for leave to cross-examine Ong Chuan Huat (encl. 91) and a similar application for leave to cross-examine R. Rajasingam was filed by the plaintiffs (encl. 99).

Upon the hearing for leave to cross-examine the deponents I allowed both applications on 5 June 1990 and cross-examination of the deponents were duly conducted by their respective Counsel. At the end of the cross-examination I heard submissions of Counsel and on 11 May 1991 I reserved judgment on encl. (77).

At this juncture I believe it is appropriate to set out in chronological sequence the events which I consider relevant to this present application:

(i) On 20 June 1988 the plaintiffs filed suit against the defendant Mohd. Jais b. Abdullah t/a Syarikat Ladang Pondok Upeh for a sum of RM121,692.89 and interest thereon at 8% p.a. from 29 January 1987 to date of realization and costs.

(ii) On 21 June 1988 the plaintiffs obtained an order, *inter alia*, restraining the defendant and/or his servants or agents until trial or further order from selling, transferring, disposing of or otherwise dealing with such monies or assets as belonging to him except in so far as the value of such monies and assets as exceed RM146,000 (encl. 5).

(iii) The said order with the penalty endorsement was served on the defendant and other parties affected on 21 June 1988.

(iv) On 8 July 1988 an application (encl. 10) was filed by the plaintiffs for final judgment against the defendant for the amount claimed in the statement of claim with interest and costs.

(v) On 26 July 1988 an application (encl. 14) was filed by the defendant through M/s R. Rajasingam & Co. to set aside the order dated 21 June 1988 (encl. 5).

(vi) On 27 July 1988 judgment in default of defence (encl. 24) was entered against the defendant.

(vii) On 8 September 1988 the application (encl. 14) to set aside the order of 21 June 1988 was dismissed.

(viii) On 11 November 1988 a sale & purchase agreement was entered into between the defendant and one Teoh Phaik See for the sale of property held under Holding No. 139 section 2 Town of Tanjong Tokong, North East District Penang together with premises No. 1-N Jalan Pantai Molek, Tanjong Tokong for the sum of RM250,000 R. Rajasingam attested the signature of the defendant.

(ix) On 17 November 1988 R. Rajasingam attested the signature of the defendant as transferor on Form 14A under the National Land Code for the transfer of the said property.

(x) On 8 December 1988 the plaintiffs applied (encl. 34) for a prohibitory order against the land held under Holding No. 139 s. 2 Town of Tanjong Tokong and the Senior Assistant Registrar granted the order on 12 December 1988.

(xi) On 15 December 1988 the plaintiffs obtained a garnishee order *nisi* to show-cause against R. Rajasingam & Co. for the attachment of a sum of RM141,649.57.

(xii) On 15 December 1988 the purchaser of the property held under Holding No. 139 section 2 Town of Tanjong Tokong, Teoh Phaik See applied to the Court for liberty to intervene and to set aside the prohibitory order granted on 12 December 1988.

(xiii) On 20 December 1988 the defendant applied (encl. 49) to set aside the judgment in default of defence (encl. 24) entered on 27 July 1988.

(xiv) On 9 January 1989 the judgment in default of defence (encl. 24) was set aside and the defendant was granted leave to defend the plaintiffs' claim (encl. 60).

(xv) On 11 January 1989 the learned Judge on the application of Teoh Phaik See varied the order dated 21 June 1988 to exclude the property held under Holding 139 section 2 Town of Tanjong Tokong and to enable the intervenor Teoh Phaik See to register the transfer. The Court further ordered that M/s R. Rajasingam & Co., solicitors for the defendant do pay forthwith into Court a sum amounting to RM146,000 out of the balance purchase price held by M/s R. Rajasingam & Co.

(xvi) The order dated 11 January 1989 with the penalty endorsement was served on R. Rajasingam on 31 July 1989.

(xvii)Encl. (77) was filed on 8 August 1989.

As stated earlier the plaintiffs have applied for leave to apply for orders of committal against R. Rajasingam for disobeying the orders of Court dated 21 June 1988 and 11 January 1989 respectively. The application is made under the provisions of O. 52 r. 2 of the RHC 1980 and the application has been proceeded with as an *inter-partes* application.

Counsel for the plaintiffs, Mr. Karpal Singh has submitted that under O. 52 r. 2(2) all that the plaintiffs/applicants need to show is a *prima facie* case. That the Court at this stage of the proceedings should not go into the merits. He refers to *Lim Kit Siang v. Dato Seri Dr. Mahathir Mohamad* [1987] CLJ (Rep) 168 and *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 1 CLJ (Rep) 33. He further submitted that failure to comply with an order of Court is *ex facie* deliberate and wilful see *State Bank of India, New Delhi v. D.S. Dalal & Ors.* [1982] Criminal Law Journal 395.

In the course of his submission Mr. Karpal has urged the Court to rule on the credibility of R. Rajasingam. He submitted that the Court should take cognizance of what transpired in Exhibits C6, C7 & C8. C6 & C7 refer to 2 reported cases where R. Rajasingam had given evidence in Court and C8 was notes of **proceedings of a criminal case where** R. Rajasingam was acting as Counsel for the accused.

As for the contempt of the order dated 21 June 1988 Mr. Karpal submitted that R. Rajasingam attested the signature of the defendant both on the sale & purchase agreement and on the memorandum of transfer. Although R. Rajasingam did not prepare the sale & purchase agreement, he approved the draft and attested the signatures. He submitted that this was in contravention of the order dated 21 June 1988 and he must have aided, abetted and advised the defendant in the breach.

On the order of 11 January 1989 Mr. Karpal submitted that although the money was in R. Rajasingam's clients account he did not pay the said sum into Court as ordered. He urged the Court to hold that the non-compliance was intentional and deliberate and there was sufficient evidence before the Court to grant leave.

Counsel for R. Rajasingam, Mr. Sethu in his submission contended that when the plaintiffs applied for and obtained the judgment in default of defence on 27 July 1988 the Mareva injunction dated 21 June 1988 ceased to have effect. Although the judgment in default was set aside on 9 January 1989 it did not revive the Mareva injunction. He further submitted that the fact that the plaintiffs had elected to proceed with the prohibitory order and garnishee order *nisi* to show cause clearly indicated that the plaintiffs were not relying on the Mareva Injunction contained in the order dated 21 June 1988.

He further submitted that the order dated 11 January 1989 was in itself an invalid order and no consent from the parties can give validity to an invalid order. Counsel also submitted that even if the Mareva Injunction was effective on 11 November 1988 the sale & purchase agreement was not in breach of the order as the prohibition was a qualified prohibition to protect only the sum of RM146,000 which the plaintiffs claimed. He cites *Oceania Castelana Armadora v. Miveralimexport* [1983] 2 AER 65.

The disobedience must be shown to be wilful and intentional and not merely casual or accidental, see *Dodington v. Hudson* [1924] 1 bing 410. He submitted there is no evidence that R. Rajasingam instigated, advised or aided the defendant in committing the alleged contempt and as such no *prima facie* case has been made out.

Mr. Sethu also submitted that in the present case there was undue delay in making the application and this was fatal to the application. He referred to *R v. Joyce, Ex parte Corporation Port Pirie* [1930] SA SR 56 and *Malaysian Bar v. Tan Sri Dato' Abdul Hamid Omar* [1989] 2 MLJ 281 where an unexplained delay of 3 months and 9 months respectively was held to be unreasonable.

I shall deal with the order dated 21 June 1988 first. As stated earlier the said order with the penalty endorsement was served on the defendant on 21 June 1988. On 26 July 1988 an application was filed by M/s R. Rajasingam & Co. as solicitors for the defendant to set aside the order dated 21 June 1988. It is therefore not unreasonable to conclude that R. Rajasingam had sight of the order dated 21 June 1988 and knowledge of the terms contained therein.

The plaintiffs' allegations are that R. Rajasingam instigated, advised, aided and abetted the defendant to breach the order of 21 June 1988 in transferring the property to Teoh Phaik See. From the evidence before this Court I find that there is insufficient evidence to support the allegations of R. Rajasingam instigating, advising or abetting the defendant to breach the order of 21 June 1988. I accept the evidence that R. Rajasingam's role in this transaction was to approve the draft of the sale & purchase agreement, attest the signature of the defendant on the sale & purchase agreement and the memorandum of transfer. I rule that his conduct herein tantamount to aiding the defendant to facilitate the transfer of the said property to Teoh Phaik See. It is my considered opinion that at this state of the proceedings, that is, application for leave, it is not necessary for this Court to enquire into the merits of the case. Accordingly I hold that a *prima facie* case has been made out.

The said property came within the ambit of the restraining order as I am not satisfied that there is evidence before this Court that the value of the other properties restrained exceeded the sum of RM146,000. I have next to consider whether I should grant leave having regard to the circumstances existing herein.

From the facts it is established that the plaintiffs obtained a garnishee order *nisi* to show cause against M/s R. Rajasingam & Co. on 15 December 1988 for the attachment of a sum of RM141,649.57 being part of the proceeds held by the firm resulting from the sale of the property held under Holding No. 139 section 2 Town of Tanjong Tokong. The filing of the application for a garnishee order is indicative that the plaintiffs had become aware of the disposal of the said property, which disposal it is alleged to be in breach of the order dated 21 June 1988. The present application (encl. 77) was filed by the plaintiffs on 8 August 1989.

There has been a lapse of nearly 8 months between the discovery of the breach and the application for leave. The plaintiffs have not explained why the application could not have been filed earlier.

In *Malaysian Bar v. Tan Sri Dato' Abdul Hamid bin Omar* [1989] 2 MLJ 281 Hashim Yeop Sani, CJ states at p. 283 and I quote:

> Finally, there has certainly been an inordinate delay in making the application. The resolution of the Malaysian Bar to institute proceedings for contempt was passed on 19 July 1988. The application for leave was filed on 24 April 1989. There was no explanation for the delay in the affidavit of the Secretary of the Bar. The allegation of contempt is a serious matter and should be pursued within a reasonable time. The delay must be explained. In our view a lapse of nearly 9 months unexplained in the affidavit is not reasonable.

Further in *R v. Joyce - Ex parte Corporation of Port Pirie* [1930] SA SR 56 the Supreme Court of South Australia through Angas Parsons J held and I quote:

> But the application which is made is to the summary jurisdiction of this Court and to the exercise of the jurisdiction in that way objection has been taken, principally on the ground of the delay of over 3 months which has taken place from the date of the publication of the article until the filing of the notice of motion in this Court. In our opinion, that objection is well taken - well taken in law, at any rate. For the reason that our decision will not necessarily conclude the matter, we think we should say nothing as to whether or not the article complained of is a contempt of Court. But we think that the objection which has been taken to this Court exercising its summary jurisdiction in this particular case under these circumstances of delay must prevail. The order of the Court will be that the motion be dismissed.

In the circumstances of the unexplained delay of nearly 8 months in filing this application I accordingly refuse leave to apply for an order for committal for alleged contempt of the order of Court dated 21 June 1988. The delay in this case had also allowed an intervening event to take place on 11 January 1989. On the application of the purchaser of the subject property, Teoh Phaik See, the Court had on 11 January 1989 varied the order dated 21 June 1988, *inter alia*, to exclude the property held under Holding No. 139 s. 2 Town of Tanjong Tokong and to enable the purchaser to register the transfer of the said property to him. As at the date of the complaint, that is, 8 August 1989 the Court had varied its original order in respect of the subject property. Although the acts complained of took place in November 1988 before the variation on 11 January 1989 I deem it improper to allow leave in the face of the variation and because the application was made only after the transaction relating to the subject property had been validated by the Court.

I shall next consider the alleged contempt of the order of Court dated 11 January 1989. The Court in varying the order of 21 June 1988, *inter alia*, ordered that:

> M/s R. Rajasingam & Co., Advocates & Solicitors of No. 28, Beach Street, Room 7, 2nd Floor, Penang solicitors for the defendant abovenamed do pay forthwith into Court a sum amounting to RM146,000 out of and from the balance purchase price of the said property amounting to RM225,000 now held by the said M/s R. Rajasingam & Co. for the said defendant.

It is not in dispute that the said order dated 11 January 1989 with the penalty endorsement was served on R. Rajasingam on 31 July 1989. It is also not in dispute that as at 11 January 1989 there was a sum of RM146,000 held by M/s R. Rajasingam & Co. It is not denied that until 8 August 1989 when this present application was filed the said sum of RM146,000 had not been paid into Court.

Counsel for R. Rajasingam has urged the Court to rule that the variation of the order made on 11 January 1989 was in itself invalid as the entering of the judgment in default of defence on 27 July 1988 rendered the Mareva Injunction order dated 21 June 1988

ineffective. Further due to the existence of the garnishee order served on R. Rajasingam he was not in a position to comply with the order to pay the sum of RM146,000 into Court without breaching the garnishee order. He also urged the Court to hold that the effective date of the order being 11 January 1989 there was inordinate delay when the application was filed on 8 August 1989 which delay was unexplained.

Counsel for the plaintiffs contended that the fact of non-compliance in itself is sufficient to establish a *prima facie* case. He submitted that at this stage it is not necessary for the Court to deal with the merits. Further he submitted that as the judgment in default was set aside on 9 January 1989 the garnishee order which was issued pursuant thereto also fails and was of no effect. Counsel states that there has been no delay as the order was served on 31 July 1989 and the application was filed on 8 August 1989.

It is not in dispute that the order dated 11 January 1989 with the penalty endorsement was duly served on R. Rajasingam on 31 July 1989. After the said service and until 8 August 1989 the sum ordered to be paid forthwith into Court had not been paid. The non-compliance was not casual or accidental. I deem it to be intentional and deliberate. From the evidence before the Court I rule that a *prima facie* case has been made out. I am of the considered opinion that there is no necessity at this stage to conduct an enquiry whether the order dated 11 January 1989 was invalid. In *Narain Singh v. S. Hardayal Singh Harika AIR* [1958] Punjab 180, Tek Chand J stated at 183 and I quote:

> So long as the injunction order has not been vacated or modified by the Court granting it or has not been reversed on appeal no matter how unreasonable and unjust the injunctions may be, the order must be obeyed. Violation of the order of injunction cannot be excused on the ground, that though the Court acted within its jurisdiction but the order that it passed was erroneous. The order granting injunction might have been erroneous, or granted improvidently, or obtained irregularly, that will not excuse the person violating it. The only questions open for consideration in proceedings for contempt for violating an injunction are, whether the Court had jurisdiction to award the injunction, and whether it had in fact been violated. Further inquiry as to its advisability or legality is not called for. The Court in contempt proceedings, will not inquire into the merits of the case in which the injunction was issued.

On the issue whether there has been inordinate delay in applying for leave in this instance I rule there has been no delay.

Although a Court order takes effect from the day it is made, for purposes of contempt proceedings a person charged with an obligation under an order of Court should not be hauled up for the disobedience thereof unless a copy of the order commanded therein has been validly served on him. This was done on 31 July 1989. I do not think it is open to R. Rajasingam to complain that the order dated 11 January 1989 was only served on him on 31 July 1989 constituted inordinate delay. What is material is whether after service had been effected there was compliance and if there was non-compliance which was deliberate and intentional whether the application for leave was filed within a reasonable time. As the application was filed on 8 August 1989 there was no delay occasioned to justify the Court to deny the application. Accordingly I allow the plaintiffs herein leave to apply for an order of committal against R. Rajasingam for disobeying the order of Court dated 11 January 1989.

I order R. Rajasingam to pay the plaintiffs costs of and incidental to this application to be taxed by the SAR.

Also found at [1991] 3 CLJ 1830